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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CAMERON W. SHARP, PETITIONER

v.

UNITED STATES, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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37pp

QUESTION PRESENTED

Does the Sixth Amendment's confrontation clause prohibit a trial *in absentia* when an accused is present for arraignment but absent for all other proceedings?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Cameron W. Sharp, respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Military Appeals rendered in this case on September 27, 1993.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Sharp,* 38 M.J. 33 (C.M.A. 1993), is reprinted as Appendix A.

The unpublished opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Sharp,* No. 90-1517 (N.M.C.M.R. January 31, 1992), is reprinted as Appendix B.

JURISDICTION

On September 27, 1993, the United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps Court of Military Review. 28 U.S.C. § 1529(3) provides jurisdiction in this case and entitles the petitioner to seek review of the United States Court of Military Appeals' decision affirming his conviction.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . [and] to have the Assistance of Counsel for his defense.

Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 804(b)(1):

> (a) Presence required. The accused shall be present at the arraignment, the time of the plea, every stage of the trial including sessions conducted under Article 39(a), voir dire and challenges of members, the return of the findings, sentencing proceedings, and post-trial sessions, if any, except as otherwise provided by this rule.
>
> (b) Continued presence not required. The further progress of the trial to and including the return of the findings and, if necessary, determination of a sentence shall not be prevented and the accused shall be considered to have waived the right to be present whenever an accused, initially present:
>
> (1) Is voluntarily absent after arraignment (whether or not informed by the military judge of the obligation to remain during the trial); . . .

Federal Rule of Criminal Procedure 43. Presence of the Defendant:

> (a) Presence required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
>
> (b) Continued Presence not required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have the right to be present whenever

a defendant, initially present,

(1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), . . .

STATEMENT OF THE CASE

On November 27, 1989, a military judge arraigned[1] petitioner on several charges under the Uniform Code of Military Justice, advising him of his right to bring any motions and asking him to enter pleas to the charges. Transcript [hereinafter Tr.] at 4, 6, 7. Petitioner's defense counsel reserved the petitioner's right to enter pleas and to raise any motions. Tr. at 7. At one point during this pretrial hearing, the judge expressed his displeasure with defense and trial counsel at their not being prepared to litigate a motion that the defense had raised. Tr. at 5.[2] Thereafter, the judge stated, "As indicated earlier on the record, we tried to go on the record once and couldn't get by the first line of that, so I called a halt to that." *Id.* Because of this delay, the judge entertained a defense continuance until January 4th or 5th, recognizing that an earlier hearing might be necessary if the trial proceeded on either date. *Id.*

Before recessing the hearing the judge asserted, "Discussions with counsel indicate that somewhere between 2 hours and a half day would be all that's necessary before we get to trial itself, or if we're going to get to trial on that date. I believe it would be prudent for us to maybe have another session prior to the 4th of

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[1] A court-martial arraignment includes: (1) a reading of the charges (unless waived by the accused), (2) stating the identity of the accuser of the charges and the date the accuser swore to them, (3) stating the identity of the authority who convened the court-martial and the date that authority referred the charges to it, and (4) stating the date the accused was served with the charges. The arraignment is complete when the judge calls upon the accused to enter pleas (the pleas themselves are not part of the arraignment). Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 904.

[2] Petitioner had asserted a motion to grant pretrial confinement credit for alleged unlawful detainment. Appellate Exhibit XVI.

January. Maybe we can at least do that by phone or something else." Tr. at 7. The judge did not advise petitioner that the court could proceed without petitioner's presence. The court then adjourned. *Id.*

On December 8, 1989, petitioner signed a pretrial agreement with a provision which required him to go to trial on or before January 4, 1990. Appellate Exhibit XI. In late December, petitioner's command granted him leave until January 2, 1990. Tr. at 9. Petitioner failed to return from leave and, on January 4, 1990, the trial judge held a pretrial hearing without petitioner. Tr. at 8, 9. After the judge found that the petitioner had voluntarily absented himself, petitioner's defense counsel requested a continuance, stating that he was unable to either locate petitioner or prepare for trial without conferring with him. Tr. at 19-20. The judge granted a continuance until January 31, 1990. Tr. at 20-21.

At the next pretrial hearing on February 1, 1990, with petitioner still absent, defense counsel again requested a continuance, stressing the importance of speaking with his client to prepare for trial. Tr. at 25-26. The judge denied the motion, finding that petitioner's absence was voluntary, and that defense counsel's presence at a pretrial investigation hearing[3] provided counsel with an adequate opportunity to prepare for trial. Tr. at 26.

Subsequently, before a judge, a panel of officer members tried petitioner *in absentia* on February 1 and 2, 1990 at a general court-martial. Contrary to his pleas, petitioner was convicted of one count of conspiracy to distribute cocaine and of one count of conspiracy to distribute a substance represented as cocaine; two counts of distributing cocaine; and one count of attempting to distribute cocaine, in violation of Articles 81, 112a, and 80, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 912a, and 880, respectively. The members sentenced petitioner to confine-

[3] A servicemember accused of offenses is entitled to a formal, nonjudicial probable cause hearing before any charges are referred to the military's highest forum, a general court-martial. Article 32, U.C.M.J., 10 U.S.C. § 832.

ment for fifteen years, reduction to the lowest paygrade, forfeiture of all pay and allowances, a fine of $5,000 or two years of additional confinement if petitioner failed to pay the fine, and a dishonorable discharge. The convening authority reduced the confinement to 10 years.

Upon review below, petitioner challenged the right of the military to try him *in absentia* before his court-martial began. Both the Navy-Marine Corps Court of Military Review and the United States Court of Military Appeals affirmed the findings and sentence.

REASON FOR GRANTING THE WRIT

It is axiomatic that in all criminal prosecutions the accused has a right to confront the witnesses against him and to have the assistance of counsel for his defense. U.S. Const. amend. VI. Indeed, the right of confrontation is "[o]ne of the fundamental guarantees of life and liberty . . . long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States. . . ." *The Constitution of the United States of America,* Analysis and Interpretation 1350 (Cong. Research Serv. 1987) (*citing Kirby v. Maddox,* 174 U.S. 47, 55, 56 (1899), *cf. Pointer v. Texas,* 380 U.S. 400, 404-405 (1965)).

To protect this fundamental right the longstanding principle in common law was that no felony trial could proceed in the defendant's absence, even if the absence was voluntary. *Crosby v. United States,* 113 S. Ct. 748, 751 (1993) (*citing* William Mikell, *Clark's Criminal Procedure* 492 (2d ed. 1918); Francis Wharton, *Criminal Pleading and Practice* 388 (9th ed. 1889); 1 Joel Bishop, *New Criminal Procedure* 178-179 (4th ed. 1895)). This canon was premised on the notion that a fair trial could take place only if the jurors met the defendant face-to-face and only if those testifying against the defendant did so in his presence. 113 S. Ct. at 751 (*citing* Francis Wharton, *Criminal Pleading and Practice*

388, 392 (9th ed. 1889). Yet, this Court acknowledged that the right of confrontation may be waived; but, it must be a knowing, intelligent waiver uncoerced from the defendant. *Brookhart v. Janis*, 384 U.S. 1 (1966).

Recognizing an exception to the common law rule prohibiting trials *in absentia*, this Honorable Court held that the voluntary absence of a defendant, after a trial has commenced, will permit the trial to proceed notwithstanding that absence, *Diaz v. United States*, 223 U.S. 442 (1912).[4] Last Term, in contrasting the circumstances of *Diaz* and *Crosby*, this Court concluded that "[i]t is unlikely . . . 'that a defendant who flees from a courtroom in the midst of trial—where judge, jury, witnesses and lawyers are present and ready to continue—would not know that as a consequence the trial could continue in his absence.' " 113 S. Ct. at 752-753 (*citing Taylor v. United States*, 414 U.S. 17, 20 (1973), *quoting United States v. Taylor*, 478 F.2d 689, 691 (1st Cir. 1973)). In extensively analyzing the exact point at which a defendant may be considered voluntarily absent and thus at what point a trial *in absentia* is permissible, writing for a unanimous court, Justice Blackmun emphatically declared that "[i]f a clear line is to be drawn marking the point at which the costs of delay are likely to outweigh the interests of the defendant and society in having the defendant present, the commencement of trial is at least a plausible place at which to draw the line." *Id.* at 752. This Court ruled that a defendant could not be found to be voluntarily absent any time prior to the beginning of his trial under Federal Rule of Criminal Procedure 43. *Id.* at 753.

Despite *Crosby's* plain pronouncement that the beginning of trial is the trigger-point for protecting the defendant's confrontation rights, the United States Court of Military Appeals ruled that

[4] Fed. R. Crim. P. 43(b)(1) provides that the accused "shall be considered to have waived the right to be present whenever the accused [i]s voluntarily absent after the trial has commenced. . . ."

Rule for Courts-Martial 804, unlike Fed. R. Crim. P. 43,[5] permits the military to try a servicemember after arraignment. *Sharp*, 38 M.J. at 37. The lower court opined that Fed. R. Crim. P. 43 does not control in courts-martial. *Id.* Of course it does not. But the basic premise of *Crosby* and ultimately the Sixth Amendment does: that unless the trial, or in this case a court-martial, is in progress, trial *in absentia* is prohibited. The United States Court of Military Appeals failed to recognize the constitutional underpinnings upon which *Crosby* rests. Instead, the lower court held that the federal rule was inapplicable to the military, and that arraignment serves as the point at which a court-martial begins.

In this case, the petitioner had little if any notice that his trial had commenced when compared to Crosby, who not only attended pretrial conferences and hearings, but also was advised that the trial was to begin on a specific date. 113 S. Ct. at 750. The military judge closed the pretrial hearing with the vaguest of direction as to when the trial would proceed, and with absolutely no warning to petitioner that his further presence was subject to waiver. At best, the trial was to begin, as the trial judge acknowledged, sometime in the future after the judge entertained motions and the accused entered pleas. As a result, petitioner was denied the express and circumstantial notice that the trial had begun and the opportunity to enter pleas which this Court found central to its decision in *Crosby*.

The constitutional underpinnings in *Crosby* clearly suggest that arraignment provides a defendant insufficient notice of the proceedings against him and his responsibility to attend them. The petitioner's right to confront the evidence against him outweighs the government's interests in an expeditious trial. Furthermore, the military must demonstrate a compelling reason to justify such a stark constitutional infirmity as this. *Burns v. Wilson*, 346 U.S.

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[5] Rule for Courts-Martial 804(b)(1) is practically identical to the federal rule, except that it substitutes "after arraignment" in place of "after trial has commenced".

137, 140, *reh. denied,* 346 U.S. 844 (1953). In short, arraignment is an incorrect milestone at which to determine that the defendant has knowingly and intelligently waived his presence to confront the evidence and witnesses which the government will employ against him.

CONCLUSION

This Court should grant *certiorari* to determine whether the Sixth Amendment forecloses the government from trying an accused *in absentia* after arraignment but before, as a practical matter, the trial begins.

Respectfully submitted,

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APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 67-967
CMR 90 1517

UNITED STATES, APPELLEE

v.

CAMERON W. SHARP, LITHOGRAPHER
SEAMAN U.S. NAVY, APPELLANT

Argued March 3, 1993
Decided Sept. 27, 1993

For Appellant: *Lieutenant James A. Douglas,* JAGC, USNR (argued); *Lieutenant James R. Crisfield, Jr.,* JAGC, USNR (on brief); *Lieutenant Commander Richard D. Zeigler,* JAGC, USNR.

For Appellee: *Major Laura L. Scudder,* USMC (argued); *Colonel T.G. Hess,* USMC, and *Commander W.F. Shields,* JAGC, USN (on brief).

OPINION OF THE COURT

CRAWFORD, Judge:

Contrary to his pleas, appellant was found guilty by a general court-martial with members of one specification each of conspiracy to distribute cocaine and of conspiracy to distribute a substance represented as cocaine; two specifications of

distributing cocaine; and one specification of attempting to distribute cocaine, in violation of Articles 81, 112a and 80, Uniform Code of Military Justice, 10 USC §§ 881, 912a, and 880, respectively. He was sentenced to confinement for 15 years, total forfeitures, reduction to the lowest enlisted grade, a fine of $5,000 or 2 years' additional confinement if he should fail to pay the fine, and a dishonorable discharge. The convening authority reduced the confinement to 10 years, and the Court of Military Review affirmed the findings and the approved sentence in an unpublished opinion dated January 31, 1992. We granted review of the following issues, 36 MJ 196:

I

WHETHER APPELLANT'S TRIAL IN ABSENTIA WAS PROPER WHERE THE GOVERNMENT FAILED TO ESTABLISH THAT APPELLANT WAS GIVEN NOTICE OF THE TRIAL DATE.

II

WHETHER A TRIAL SHOULD BE CONTINUED, UPON DEFENSE REQUEST, WHERE THE ACCUSED IS NOT AVAILABLE TO ASSIST IN HIS OWN DEFENSE AND TRIAL DEFENSE COUNSEL STATES THAT HE IS UNPREPARED DUE TO HIS RELIANCE UPON A NEGOTIATED PRETRIAL AGREEMENT THAT, DUE TO THE ACCUSED'S ABSENCE, IS NO LONGER IN EFFECT.

We hold that appellant's trial in absentia was proper and that the military judge did not abuse his discretion in denying defense counsel's request for a continuance.

FACTS

Appellant was arraigned on November 27, 1989. After his arraignment, he was released and "granted leave over the Christmas and New Year holidays." The court below found that

> it was clear from the discussion during the proceedings on 27 November 1989 that the next date for trial was set for 4 January 1990. Albeit the military judge did not state directly that the court was to reconvene on that date, but based on the request of the appellant's civilian counsel for a continuance until the 4th or 5th of January, the military judge's later statement that it would be prudent to have another session or phone conference "prior to the 4th of January" clearly indicates that that was the date the trial would resume.

Unpub. op. at 2.

The Court of Military Review noted that neither "counsel sought a more definite" date and that "appellant had not returned" from his holiday leave "by the time the trial actually began on February 1, 1990." Unpub. op. at 2.

At a session under Article 39(a), UCMJ, 10 USC § 839(a), on January 4, 1990, the Government introduced evidence that appellant went on leave on December 22, 1989, and was due to return on January 2, 1990. He had not been granted an extension of his return date and had not appeared at his unit for duty. Appellant's individual defense counsel accepted the prosecution's proffer that efforts were made to find appellant at various locations in the local community. Defense counsel requested a continuance, indicating that, while he wanted preparation time, the thrust of his request concerned finding appellant: "The court must consider all factors, and one factor I

think is very significant is the fact that he was heading home to see his mother and he never got there. And I am quite concerned that something actually did happen to him." Defense counsel requested a 1-month continuance until January 31 or February 1 or 2, 1990. The military judge granted a continuance until January 31, 1990.

At an Article 39(a) session on February 1, 1990, appellant was still missing. Defense counsel requested a second continuance, this time to prepare, since appellant would be unable to plead guilty as planned, due to his absence. Defense counsel acknowledged that he (counsel) was present at the investigation under Article 32, UCMJ, 10 USC § 832, and had interviewed the key government witnesses; however, his chief reason for requesting the continuance was to talk to appellant. Finally, defense counsel also acknowledged that as long as appellant remained away, he could not be prepared for trial. The military judge denied the motion for the second continuance.

DISCUSSION

I

The first granted issue concerns existence of notice of the trial date. RCM 804(b)(1), Manual for Courts-Martial, United States, 1984, provides:

> The further progress of the trial to and including the return of the findings and, if necessary, determination of a sentence shall not be prevented and the accused shall be considered to have waived the right to be present whenever an accused, initially present:
>
> (1) Is voluntarily absent after arraignment (whether or not informed by the military judge

of the obligation to remain during the trial);

. . . .[1]

Fed.R.Crim.P. 43(b)[2] is similar to paragraph 11*c*, Manual for Courts-Martial, United States, 1969 (Revised edition),[3] the precursor to RCM 804(b)(1)

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[1] The Discussion to RCM 804(b) states:

> "Voluntary absence" means voluntary absence from trial. For an absence from court-martial proceedings to be voluntary, the accused must have known of the scheduled proceedings and intentionally missed them. For example, although an accused servicemember might voluntarily be absent without authority, this would not justify proceeding with a court-martial in the accused's absence unless the accused was aware that the court-martial would be held during the period of the absence.
>
> * * *
>
> The prosecution has the burden to establish by a preponderance of the evidence that the accused's absence from trial is voluntary. Voluntariness may not be presumed, but it may be inferred, depending on the circumstances. For example, it may be inferred, in the absence of evidence to the contrary, that an accused who was present when the trial recessed and who knew when the proceedings were scheduled to resume, but who nonetheless is not present "when court reconvenes at the designed time, is absent voluntarily.

[2] This rule states:

> The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,
>
> (1) is voluntarily absent *after the trial has commenced* (whether or not the defendant has been informed by the court of the obligation to remain during the trial). . . .
>
> (Emphasis added.)

[3] This paragraph provided:

> The accused's voluntary and unauthorized absence *after the trial has commenced* in his presence and he has been arraigned

A

The initial question we must answer is whether notice to appellant of the exact trial date is a prerequisite to trying appellant in absentia. We answer this question in the negative. Ordinarily, notice of the exact trial date would be desirable but is not a prerequisite for a trial in absentia. There is no requirement that appellant be warned that he has a right to be present and that the trial might continue in his absence. *Taylor v. United States*, 414 U.S. 17, 19, 94 S.Ct. 194, 194, 38 L.Ed.2d 174 (1973).

In *United States v. Houghtaling*, 2 USCMA 230, 8 CMR 30, 1953 WL 1615 (1953), a capital case, a court convened on May 29, 1951, to try appellant. After the charges were read, the Government requested a continuance because several witnesses had failed to appear. The law officer (predecessor to the military judge) granted the continuance. Upon reconvening the court on June 10, 1951, "it appeared that, following notice of the resumed hearing [at an unspecified time], [one] appellant . . . had escaped from confinement. . . . Defense counsel objected to proceedings against him in his absence—but the objection was overruled. Pleas of the remaining accused to the charge and specification, read on May 29, were thereupon received." *Id.* at 232, 8 CMR at 32. This Court held that there was no violation of appellant's rights because appellant "was fully informed that he was to be tried, and was thereby notified that he would have full opportunity to confront the witnesses against him. . . ." *Id.* at 235, 8 CMR at 35. *See also United States v. Houtchens*, 926 F.2d 824 (9th cir. 1991); *United States v. Sanchez*, 790 F.2d 245, 249 (2d Cir. 1986).

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does not terminate the jurisdiction of the court, which may proceed with the trial to findings and sentence notwithstanding his absence. In such a case the accused, by his wrongful act, forfeits his right of confrontation.

(Emphasis added.)

As Judge Brosman noted in *Houghtaling*:

> Although one's right to be present during his trial is undoubtedly of great importance, the consequences which may follow upon his voluntary and willful absence are clearly the fruit of his own wrongful act no matter what the character of the charge asserted against him. To hold otherwise would be to reward one accused of a capital offense who is ingenious enough to escape from confinement, but to deny the benefit of that reward to his unfortunate brother who has committed a crime only slightly less serious in degree and has also escaped the clutches of the law. We can hardly express the policy underlying the general rule—from which we recognize no military exception—more clearly and with greater forthrightness than did the court in *Falk v. United States*, [15 App. DC 446] at 460 [1834], a non-capital case, quoted with approval in *Diaz v. United States*, [223 U.S. 442] at 458, [32 S.Ct. 250, 56 L.Ed. 500]:
>
> > ". . . . The question is one of broad public policy, whether an accused person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of courts and juries and turn them into a solemn farce, and ultimately compel society, for its own safety, to restrict the operation of the principle of personal liberty. Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong. And yet this would

> be precisely what it would do if it permitted an escape from prison, or an absconding from the jurisdiction while at large on bail, during the pendency of a trial before a jury, to operate as a shield. . . ."

2 USCMA at 234, 8 CMR at 34.

The rationale for this rule is stated in *Houghtaling* as follows:

> Of necessity military personnel are highly mobile, and on occasion are scattered to the four winds within a matter of hours. In oversea theaters, and particularly in combat areas, witnesses, both military and civilian, are exposed to uncommon hazards which make their assembly for trial difficult always and too often impossible. Certainly the degree of prosecution hardship sharply increases as the time of trial is delayed. The capital offense escapee may thus gain great advantage, which will vary directly with the length of time he is able to prolong his absence. This is, of course, true in all areas of law enforcement, but it is greatly intensified in that of military judicial administration. We discern no reason for impeding—perhaps even defeating—the prosecution of those who choose not to be present for trial, regardless of the offense with which they are charged. This would, we believe, be distinctly in derogation of the just claims of the military society, an interest often disregarded in febrile evaluation of the rights of frequently undeserving individuals.

Id. at 234, 8 CMR at 34.

The factual situation in *United States v. Peebles*, 3 MJ 177 (CMA 1977), cited by the defense, is entirely different from that case. In *Peebles* the Court held that an accused who fails

to receive actual notice of the trial date, some 8 months after the case had been continued for an unknown period, could not be tried *in absentia.*

In a recent case, *Crosby v. United States,* ___ U.S. ___, 113 S.Ct. 748, 122 L.Ed.2d 25 (1993), the Supreme Court held that a defendant who was not present at the beginning of the trial could not be tried *in absentia.* This holding is based on Fed.R.Crim.P. 43, which provides that "[t]he defendant shall be present . . . at every stage of the trial . . . *except*" when a defendant who was "initially present, . . . is voluntarily absent after the trial has commenced. . . ." (Emphasis added.) Justice Blackmun, in writing for the Court, noted that Fed.R.Crim.P. 43

> treats midtrial flight as a knowing and voluntary waiver of the right to be present. Whether or not the right constitutionally may be waived in other circumstances—and we express no opinion here on that subject—the defendant's initial presence serves to assure that any waiver is indeed knowing. . . . Moreover, a rule that allows an ongoing trial to continue when a defendant disappears deprives the defendant of the option of gambling on an acquittal knowing that he can terminate the trial if it seems the verdict will go against him—an option that might otherwise appear prefe able to the costly, perhaps unnecessary, path of becoming a fugitive from the outset.

___ U.S. at ___-___, 113 S.Ct. at 752-53.

The language of Fed.R.Crim.P. 43(b)(1)—"after the trial has commenced"—did appear in paragraph 11*c*, 1969 Manual, *supra,* but was deleted in RCM 804(b)(1). Since *Crosby* was based on interpretation of Fed.R.Crim.P. 43, it is not controlling here. Accordingly, under RCM 804, an accused may be tried *in absentia* when there is a voluntary absence after arraignment.

B

The second question we must consider is whether appellant's absence was voluntary. "Federal appellate courts have held that the defense has the burden of going forward and offering evidence to refute the inference that the absence was voluntary." *United States v. Abilar*, 14 MJ 733, 735 (AFCMR 1982), *pet. denied*, 15 MJ 324 (1983). We agree. Under the facts of this case we conclude that the defense did not meet this burden and thereby did not "refute the inference" of a voluntary absence. *Cf. United States v. Cook*, 20 USCMA 504, 43 CMR 344 (1971).

For the foregoing reasons we hold that appellant's trial in absentia was proper.

II

The second granted issue concerns whether the military judge should have granted a continuance as requested by the defense. Article 40, UCMJ, 10 USC § 840, provides: "The military judge . . . may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just." RCM 906(b)(1) further provides that only a judge may grant a continuance. The rule as fleshed out in the Discussion to RCM 906(b)(1) is as follows:

> The military judge should, upon a showing of reasonable cause, grant a continuance to any party for as long and often as is just. Whether a request for a continuance should be granted is a matter within the discretion of the military judge.

(Citation omitted.)

Granting a continuance is within the discretion of the military judge, and a denial will be reversed only for an abuse of discretion. *See, e.g., United States v. Thomas*, 22 MJ 57, 59 (CMA 1986).

We are not unsympathetic to the dilemma faced by defense counsel here. As the United States District Court in *United States v. Zavala-Serra*, 666 F.Supp. 1432, 1437 (D. Hawaii 1987), stated:

> This Court is very sympathetic to defense counsel's expressed concerns about trying this case in the absence of his client. Nevertheless, this Court believes that defense counsel is as well-prepared as he could ever be under the present circumstances. Defense counsel has had the Government's witness/exhibit lists, [and] copies of the Government's documentary exhibits, . . . for over a month. . . . Defense counsel herein faces the same difficulty as [any other defense attorney whose client is absent]. . . . [Appellant] brought this upon himself by failing to appear for his trial.

In deciding whether to grant a continuance, the military judge must of necessity balance the public interest with the right of the accused to be present. Here, the judge had already granted one continuance when appellant failed to appear for a proceeding for which he had been given notice. The essence of defense counsel's request for a second continuance was to afford him time to talk with appellant in order to better prepare for trial. However, defense counsel was present at the Article 32 investigation and had interviewed the key government witnesses. Further, appellant's absence was of his own making. Any further delay could have resulted in unavailability of witnesses or diminution of their memories. On balance, we conclude that the military judge did not abuse his discretion in failing to grant another continuance.

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Judges COX and GIERKE concur.

WISS, Judge (concurring in part and in the result):

I concur in Part II of the majority opinion, but I write separately to express my rationale for concurring in the disposition of Issue I.

RCM 804(b), Manual for Courts-Martial, United States, 1984, provides that, once an accused has been arraigned, the trial may proceed and the accused "shall be considered to have waived the right to be present whenever" such an accused "[i]s voluntarily absent after arraignment (whether or not informed by the military judge of the obligation to remain during the trial). . . ." There is no suggestion here that appellant's absence was involuntary, so the literal requirement of the rule is met.[1]

Nonetheless, a constitutional issue lingers beneath the surface of this rule that the majority does not, in my view, adequately address. According to *Crosby v. United States*, ___ U.S. ___, ___, 113 S.Ct. 748, 751, 122 L.Ed.2d 25 (1993), the Supreme Court, in *Diaz v. United States*, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912), "authorized a limited exception to the general rule" at common law that no felony trial may occur in absentia, "an exception that was codified eventually in [Fed.R.Crim.P.] 43(b)"—an exception for a case in which, at the time of the initiation of the absence, the trial had "already commenced." In *Crosby*, decided earlier this Term,

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[1] I notice that the Discussion that follows RCM 804(b) states:

> The prosecution has the burden to establish by a preponderance of the evidence that the accused's absence from trial is voluntary. Voluntariness may not be presumed, but it may be inferred, depending on the circumstances. . . .

I have some concern that the majority opinion—speaking as it does in terms of a defense "burden of going forward" and concluding as it does "that the defense" here "did not meet this burden," 38 MJ at 37—might mislead a reader into thinking that voluntariness may be presumed. *But see* n.1, *supra*.

the Supreme Court pointed out that *Diaz*, like the case then at bar, involved midtrial flight, as opposed to pretrial flight, and treated "midtrial flight as a *knowing and voluntary waiver* of the right to be present." ___ U.S. at ___, 113 S.Ct. at 752 (emphasis added). Thus, it is clear to me that the Supreme Court will constitutionally require that any purported waiver of the right to be present at trial be both voluntary, as RCM 804 requires, and knowing.[2]

It would seem that a knowing waiver in this regard, at a minimum, would require some notice to the accused of at least the general point at which the proceedings would resume (at least if the hiatus is to be lengthy), *see United States v. Peebles*, 3 MJ 177 (CMA 1977), and some notice that, even in his absence, the proceedings would continue.[3] I agree with the majority's discussion of this first element, but I am concerned that the majority does not acknowledge at all the second element.

As to midtrial flight, the *Crosby* Court reasoned: "It is unlikely . . . 'that a defendant who flees from a courtroom in the midst of a trial—where judge, jury, witnesses and lawyers are present and ready to continue—would not know that as a consequence the trial could continue in his absence.' " ___ U.S. at ___, 113 S.Ct. at 752, quoting *Taylor v. United States*, 478 F.2d 681, 691 (1st Cir. 1973), quoted with approval in *Taylor v. United States*, 414 U.S. 17, 20, 94 S.Ct. 194, 196, 38 L.Ed.2d 174 (1973). The situation arguably is much different where the flight is not midtrial in the sense described by

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[2] So that practitioners may not be mislead in applying RCM 804, it might be advisable to incorporate into the rule the constitutional requirement that a waiver must be knowing.

[3] Typically, a military judge will expressly advise an accused that, inasmuch as he has been arraigned, trial may proceed in his absence on the scheduled date. For some reason not reflected in the record, this military judge failed to given such advice—thus, the issue.

the Supreme Court, and where the record is otherwise devoid of any indication that the absent accused knew that, even in his absence, trial would proceed.[4]

As the Chief Judge points out, this Court as long ago as *United States v. Houghtaling*, 2 USCMA 230, 8 CMR 30, 1953 WL 1615 (1953), has viewed arraignment in the military justice system as the commencement of trial. It may be that, in certain cases like this one, the trial of the merits does not actually begin immediately after arraignment, though more usually than not it does. At the same time, a military accused is arraigned by a military judge, rather than a Federal magistrate, and that gives special force to the argument that the subsequently absent military accused has "by his own act remove[d] himself from the presence of a court trying him on a criminal charge. . . ." *Id.* at 234, 8 CMR at 34.

Given these differences between the usual operation of the military justice system and the Federal civilian system, I see no compelling reason to deviate from the *Houghtaling* notion that, in the military justice system, arraignment constitutes commencement of the trial for purposes of marking the point after which an accused may be tried even though voluntarily absent. As well, I am satisfied, for these same reasons, that a military accused who absents himself after arraignment has done so just as knowingly as has a civilian defendant in the midst of trial.

SULLIVAN, Chief Judge (concurring in the result):

The majority opinion overlooks a significant constitutional issue raised by the Supreme Court decision in *Crosby v. United States*, ___ U.S. ___, 113 S.Ct. 748, 122 L.Ed.2d 25

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[4] Indeed, it was just such a case that was offered to the Supreme Court in *Crosby*, but the Court declined to answer the constitutional question in light of its decision there that the trial violated Fed.R.Crim.P. 43. *Crosby v. United States*, ___ U.S. ___, ___, 113 S.Ct. 748, 753, 122 L.Ed.2d 25 (1993).

(1993). There, the Supreme Court reversed a defendant's conviction because his absence from trial began before, not "after the trial has commenced" as required by Fed.R.Crim.P. 43. However, because it reversed on the basis of a Federal Rule of Criminal Procedure, the Supreme Court expressly noted that "we do not reach Crosby's claim that his trial *in absentia* was also prohibited by the Constitution." ___ U.S. at ___, 113 S.Ct. at 753.

The facts of *Crosby* are as follows:

> In April 1988, a federal grand jury in the District of Minnesota indicted petitioner Michael Crosby and others on a number of counts of mail fraud. The indictment alleged that Crosby and his codefendants had devised a fraudulent scheme to sell military-veteran commemorative medallions supposedly to fund construction of a theme park honoring veterans. *Crosby appeared before a federal magistrate on June 15, 1988, and, upon his plea of not guilty, was conditionally released from detention after agreeing to post a $100,000 bond and remain in the State. Subsequently, he attended pretrial conferences and hearings with his attorney and was advised that the trial was scheduled to begin on October 12.*
>
> Crosby did not appear on October 12, however, nor could he be found. United States deputy marshals reported that his house looked as though it had been "cleaned out," and a neighbor reported that petitioner's car had been backed halfway into his garage the previous evening, as if he were packing its trunk. As the day wore on, the court remarked several times that the pool of 54 potential jurors was being kept waiting, and that the delay in the proceedings would interfere with the court's calendar.

The prosecutor noted that Crosby's attorney and his three codefendants were present, and commented on the difficulty she would have in rescheduling the case, should Crosby later appear, because some of her many witnesses were elderly and had health problems.

When the District Court raised the subject of conducting the trial in Crosby's absence, Crosby's attorney objected. Nevertheless, after several days of delay and a fruitless search for Crosby, the court, upon a formal request from the Government, decided that trial would commence on October 17. The court ordered Crosby's $100,000 bond forfeited and stated for the record its findings that Crosby had been given adequate notice of the trial date, that his absence was knowing and deliberate, and that requiring the Government to try Crosby separately from his codefendants would present extreme difficulty for the Goverment, witnesses, counsel, and the court. It further concluded that Crosby voluntarily had waived his constitutional right to be present during the trial, and that the public interest in proceeding with the trial in his absence outweighed his interest in being present during the proceedings. Trial began on October 17, with petitioner's counsel actively participating, and continued in Crosby's absence until November 18, when the jury returned verdicts of guilty on charges against Crosby and two of his codefendants. *See United States v. Cheatham*, 899 F.2d 747 (CA8 1990). One codefendant was acquitted.

Approximately six months later, Crosby was arrested in Florida and brought back to Minnesota, where he was sentenced to 20 years in prison followed by 5 years on probation with specified conditions. . . .

___ U.S. at ___, 113 S.Ct. at 750 (emphasis added).

Appellant, like Crosby, absented himself after arraignment. Nevertheless, the majority opinion affirms appellant's conviction on the basis of RCM 804, Manual for Courts-Martial, United States, 1984, and its trial-in-absentia provision which is worded differently from Fed.R.Crim.P. 43. It permits such trials if the accused "[i]s voluntarily absent after arraignment" rather than "after the trial has commenced" as Fed.R.Crim.P. 43 provides. Appellant's arraignment, however, was by a military judge rather than a Federal magistrate. Arraignment by a military judge begins a trial by court-martial. *See United States v. Houghtaling*, 2 USCMA 230, 8 CMR 30, 1953 WL 1615 (1953). Accordingly, I further conclude that the constitutional holding of the Supreme Court in *Diaz v. United States*, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912), is satisfied by RCM 804(b)(1) and no constitutional error occurred in this case.

APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA VA 22332-2400

IN THE U.S. NAVY-MARINE CORPS COURT
OF MILITARY REVIEW

BEFORE

KENT A. WILLEVER R. A. STRICKLAND JAMES E. ORR

UNITED STATES

v.

CAMERON W. SHARP, 314 78 5980
LITHOGRAPHER SEAMAN (E-3), U.S. NAVY

NMCM 90 1517 Decided 31 January 1992

Sentence adjudged 2 February 1990. Military Judge: Donald E. Edington. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Submarine Force, U.S. Atlantic Fleet, Norfolk, VA 23511-5230.

LCDR RICHARD D. ZEIGLER, JAGC, USNR, Appellate Defense Counsel
Capt M. K. SCHALLER, USMC, Appellate Defense Counsel
Maj LAURA L. SCUDDER, USMC, Appellate Government Counsel

ORR, Judge:

The appellant was convicted *in absentia* of two specifications of conspiracy to distribute cocaine, two specifications of distributing cocaine, and a single specification of attempting to distribute cocaine in violation of Articles 81 and 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 881, 912a. A panel of officer members sentenced the appellant to receive a dishonorable discharge, to be confined for 15 years, to forfeit all pay and allowances, to be reduced to pay grade E-1, and to pay a fine of $5,000.00 and if the fine is not paid to be further confined until the fine is paid but not more than 2 additional years. The convening authority disapproved that part of the sentence extending the confinement in excess of 10 years but otherwise approved the sentence as adjudged.

The record of trial has been submitted to us with eight assignments of error.[1] The first three of these concern the

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[1] I. THE MILITARY JUDGE ERRED BY FINDING THAT APPELLANT'S ABSENCE FROM POST-ARRAIGNMENT TRIAL SESSIONS WAS VOLUNTARY.

II. THE MILITARY JUDGE ERRED BY DENYING TRIAL DEFENSE COUNSEL'S REQUEST FOR A CONTINUANCE, THEREBY DEPRIVING APPELLANT OF HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

III. THE MILITARY JUDGE ERRED IN ACCEPTING, IN THE ABSENCE OF APPELLANT, STIPULATIONS IN THE FORM [OF] AVERMENTS OF COUNSEL.

IV. THE MILITARY JUDGE ERRED BY NOT, *SUA SPONTE*, DECLARING A MISTRIAL WHERE THE MILITARY JUDGE PERCEIVED THAT THE SIGNIFICANT MODIFICATIONS TO THE CONVENING ORDER THE DAY BEFORE TRIAL CREATED AT LEAST THE APPEARANCE OF 'COURT STACKING' BY THE CONVENING AUTHORITY.

V. THE EVIDENCE WAS NOT SUFFICIENT TO PROVE APPELLANT GUILTY BEYOND A REASONABLE DOUBT. [Footnote omitted.]

military iudge's determination that the appellant's absence following his arraignment on 27 November 1989 was voluntary, and once having made that determination, that the trial would proceed despite the civilian defense counsel's request for a continuance. We note initially that the appellant was released from confinement following his arraignment and was subsequently granted leave over the Christmas and New Year's holidays but failed to either formally check out on leave or return when his leave expired. The Government provided evidence of the appellant's absence that would have been sufficient to prove the absence was unauthorized if the appellant had been charged with that offense. Once sufficient information is provided to the military judge from which he may infer that the absence was voluntary, the burden of persuading the judge otherwise rests with the defense. *United States v. Abilar,* 14 M.J. 733, 735 (A.F.C.M.R. 1982), *pet. denied,* 15 M.J. 324 (C.M.A. 1983). We also find that it was clear from the discussion during the proceedings on 27 November 1989 that the next date for trial was set for 4 January 1990. Albeit the military judge did not state directly that the court was to reconvene on that date, but based on the request of the appellant's civilian counsel for a continuance until the 4th or 5th of January, the military judge's later statement that it would be prudent to have another session or phone conference "prior to the 4th of January" clearly indicates that that was the date the trial would resume. Record at 5 & 7. Neither of the appellant's counsel sought a more definite statement as between either of the two dates proposed by the civilian defense counsel, and the appellant had not returned by the time the trial

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VI. THE EVIDENCE WAS NOT SUFFICIENT TO PROVE APPELLANT GUILTY BEYOND A REASONABLE DOUBT AS TO SPECIFICATION 1 OF CHARGE I AND SPECIFICATION 3 OF CHARGE II.

actually began on 1 February 1990. Under the circumstances, any misunderstanding by the appellant should have been clarified by his counsel. *See United States v. Yarn*, 32 M.J. 736 (A.C.M.R. 1991). Certainly the appellant's leave was to expire in ample time to permit his attendance at a 4 January hearing.

It is not necessary that the Government disprove every possible theory concerning an accused's whereabouts consistent with an involuntary absence. *Abilar* at 735. As we have indicated above, we find there was sufficient information offered in evidence to raise the inference that the appellant's absence was voluntary and to shift the burden to the defense to show that it was involuntary. Consequently, to the extent proffers of expected testimony were made by the trial counsel, vice calling witnesses about efforts to locate the appellant either at hospitals in the Norfolk, Virginia, area where the appellant was stationed or at his home in Indianapolis, Indiana, reliance on those proffers was unnecessary. Thus the situation before us now is unlike that in *United States v. Sanders*, 31 M.J. 834 (N.M.C.M.R. 1990), where we held that the Government's reliance on defense counsel's averment that he had informed Sanders of the date of trial was improper and, in conjunction with other errors, we set aside the findings and sentence.

As to the second assignment of error, the appellant asserts that by denying his civilian defense counsel's second request for an indefinite continuance the military judge denied him the effective assistance of counsel since his counsel was relying upon a pretrial agreement that had been concluded before the appellant embarked on his voluntary absence and was otherwise unprepared to defend a contested case. In actuality, the military judge granted the civilian defense counsel's initial request for a continuance when the court reconvened on 4

January 1991 to allow counsel more time to prepare to defend a contested case. The date for reconvening, 31 January 1991, was proposed by the civilian defense counsel. When the court actually reconvened on 1 February, the civilian defense counsel made it clear that he considered himself unprepared as long as the appellant was absent. Record at 25-27. Under these circumstances, the military judge did not abuse his discretion by denying a further continuance. *See United States v. Houghtaling*, 2 (A.C.M.R. 1973); *United States v. Allison*, 47 C.M.R. 968 (A.C.M.R. 1973); *United States v. Condon*, 42 C.M.R. 421 (A.C.M.R. 1970).

Although the appellant claims that his civilian defense counsel was ineffective because counsel stated he was unprepared to defend a contested case, appellant's counsel admitted he was present during the Article 32, UCMJ, pretrial investigation and that he had interviewed the principal Government witness. Record at 26. More significantly, the appellant fails to state what specific errors or omissions were made by defense counsel because of his purported inability to prepare. *Strickland v. Washington*, 466 U.S. 648, 106 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987).

As to the appellant's third assignment of error, our decision in *Sanders*, 31 M.J. 834, stands for the proposition, *inter alia*, that "statements of counsel not under oath, unless incorporated into stipulations or judicial notice, are incompetent as evidence. . . ." 31 M.J. at 837. In the case before us, the trial counsel made certain offers of proof concerning the testimony of witnesses who were available to be called about their efforts to locate the appellant when he did not return from his authorized period of leave. Record at 17. Although the civilian defense counsel accepted those proffers, the Government had produced sufficient evidence of the appellant's voluntary absence without them, through the testimony of the appellant's

leading petty officer and through documentary evidence, that such "evidence" was superfluous and any reliance on it was harmless.

As for the appellant's fourth assignment of error, the convening authority modified his convening order the day before the trial actually began by excusing four of the original seven members who had been appointed 10 weeks earlier and appointing five new members. The four members excused were one Navy Captain (O-6), one Commander (O-5), and two Lieutenant Commanders (O-4). The five new members were one Commander, one Lieutenant Commander, two Lieutenants (O-3), and one Ensign (O-1). Despite the lapse of time and the decidedly more junior composition of the court, the military judge made the comment that making such a change the day before trial could be construed as "somehow being a stacking of the court." Record at 25. The military judge also stated that "it does not appear to be a problem in this particular case." Record at 24. No motion or objection concerning the change in the panel was made by the defense, and as a result, we have no factual explanation as to why such changes were made.

We have stated previously: "The accused bears the burden of raising the issue of unlawful command influence. He does so by establishing the existence of at least the appearance of unlawful command influence. . . . Mere assertions or speculation without some supporting evidence are not sufficient to raise the issue." *United States v. Allen*, 31 M.J. 572, 590 (N.M.C.M.R. 1990) (citation omitted). We have also stated that "when the defense, at trial, raises an issue of command influence through the presentation of some evidence sufficient to render reasonable a conclusion in favor of the allegation asserted, the burden shifts to the Government to prove, by clear and positive evidence, that command influence did not occur." *United States v. Jones*, 30 M.J. 849, 854 (N.M.C.M.R.

1990) (footnote and citation omitted). *See also United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991) (holding that taint from a subordinate's manipulation of list of prospective members was not alleviated by subsequent untainted reviews and noting that "[t]his is not a case . . . where appellant, being aware of the command subordinate's manipulation, still chose trial by members"); *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986) (holding that systematic exclusion of enlisted personnel below rank of E-7 and of junior officers constituted improper command influence after defense counsel contested the manner of appointing enlisted members and filed motion for appropriate relief).

As we have noted, contrary to the present assertion of the appellant, the military judge did *not* perceive that court stacking had occurred in this case. In addition, no objection or motion challenging the array was made by the defense at trial. Consequently, we discern no unlawful command influence in the modification of the convening order 10 weeks after the original panel was appointed or in the substitution of more junior members for more senior members.

As to the appellant's remaining assignments of error, we have no reasonable doubt concerning the appellant's guilt of the offenses of which he stands convicted or of the fact that the "Cameron Sharp" identified by the witnesses at trial was in fact the appellant. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). Likewise, we find no error in the military judge's denial of the appellant's motion for credit for alleged illegal pretrial confinement, and we do not find a sentence of confinement for 10 years and a dishonorable discharge to be inappropriately severe for a 28-year-old servicemember who was selling cocaine both on board a military installation and aboard ship.

The findings of guilty and the sentence as approved on review below is affirmed.

JAMES E. ORR

Chief Judge WILLEVER and Senior Judge STRICKLAND concur.

KENT A. WILLEVER

R. A. STRICKLAND

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